



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **MAY 30 2013** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual who owns a car stereo and accessories business. It seeks to employ the beneficiary permanently in the United States as a mechanic – electronics/designer specialist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner failed to establish by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's August 22, 2012 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was filed and accepted for processing by DOL on April 27, 2001. The rate of pay or the proffered wage set forth by the DOL is \$35,000 per year. The Form ETA 750 also indicates that the position requires two years of work experience in the job offered or in the related occupation of a mechanic (auto sound and security). The petitioner in this case is a sole proprietor. [REDACTED] is the sole proprietor. On the Form I-140 petition, the petitioner claimed to have established the business in 1997, to currently employ five people, and to have gross annual income and net annual income of \$891,584 (2010) and \$113,350 (2010), respectively.

To demonstrate that the petitioner has the ability to pay the proffered wage from April 27, 2001 onwards, the petitioner submitted copies of the following evidence:

- The sole proprietor's personal tax returns filed on the Internal Revenue Service (IRS) Forms 1040 U.S. Individual Income Tax Returns for the years 2001 through 2011 along with IRS Forms 940 Employer's Annual Federal Unemployment (FUTA) Tax Returns for 2003 through 2008 and IRS Forms 941 Employer's Quarterly Federal Tax Return for 2006 through 2010;
- IRS Forms W-2 Wage and Tax Statement issued by the petitioner to the beneficiary for the years 2005 through 2007;
- IRS Forms W-2 issued by the petitioner to other employees: [REDACTED] for the years 2001 through 2011; [REDACTED] for 2002; [REDACTED] for 2001; and [REDACTED] for 2005 and 2006; and
- Statements of balance sheet of the sole proprietor for 2001 through 2012.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the

petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Based on the evidence submitted, the beneficiary received the following wages from the petitioner in 2005, 2006, and 2007:

<i>Tax Year</i>	<i>Actual wage (AW) (Box 1, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2005	\$18,198	\$35,000	(\$16,802)
2006	\$35,048	\$35,000	Exceeds the PW
2007	\$5,392	\$35,000	(\$29,608)

Therefore, the petitioner has established the ability to pay in 2006, but not in any other relevant years from the priority date.

When the petitioner does not establish that it employed or paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner, as noted earlier, is structured as a sole proprietorship. Sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors

report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family from 2001, the priority year.<sup>2</sup> On June 22, 2012, the director issued a Request for Evidence (RFE), advising the petitioner to submit a list of the sole proprietor's monthly recurring household expenses. In response, the petitioner submitted a list of his average monthly recurring expenses for 2001-2011.

The table below shows the details of the director's analysis with respect to the petitioner's ability to pay:

Tax Year	The Petitioner's AGI <sup>3</sup>	Annual Household Expenses	Net Income (AGI less Annual Household Expenses)	Proffered Wage
2001	\$40,439	\$26,904	\$13,535	\$35,000
2002	\$51,345	\$45,360	\$5,985	\$35,000
2003	\$52,404	\$52,152	\$252	\$35,000
2004	\$56,097	\$53,748	\$2,349	\$35,000
2005	\$54,794	\$58,980	(\$4,186)	\$35,000
2006	Not considered <sup>4</sup>	\$84,972	Not considered	\$35,000
2007	\$94,178	\$79,272	\$14,906	\$35,000

<sup>2</sup> Based on the evidence submitted, the sole proprietor supported two people (himself and his spouse) in 2001 and 2002, three people (himself, his spouse, and their child) in 2003 and 2004, five people (plus his parents) in 2005, and six people (plus two additional children) from 2006 onwards.

<sup>3</sup> The adjusted gross income on the IRS Form 1040 is found on line 33 (2001), 35 (2002), 34 (2003), 36 (2004), and 37 (2005-2011).

<sup>4</sup> The petitioner, as noted above, has established the ability to pay in 2006 by actually paying the beneficiary more than the proffered wage.

2008	\$94,954	\$100,872	(\$5,918)	\$35,000
2009	\$100,770	\$100,140	\$630	\$35,000
2010	\$111,029	\$110,136	\$893	\$35,000
2011	\$155,141	\$116,628	\$38,513	\$35,000

Hence, the director concluded that it is not realistic for the petitioner to be able to pay the beneficiary's proffered wage of \$35,000/year during any relevant timeframe including the period from the priority date in 1998 or subsequently, except in 2006 and 2011. The AAO agrees.

On appeal, counsel urges the AAO to consider the petitioner's statements of balance sheet for 2001 through 2012 as evidence of the petitioner's ability to pay. Counsel points to the amount of cash available and the personal equity at the end of each year from 2001 through 2012.

The AAO, however, cannot accept any of the statements of balance sheet submitted as evidence of the petitioner's ability to pay. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements *must* be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. An unaudited financial statement consists of the unsupported assertions of management. In this case, the accountant's letter accompanying the statements of the balance sheet states that none of the statements submitted is audited.

On appeal, counsel for the petitioner indicates that [redacted] who worked as a mechanic – electronics/designer specialist from 2001, voluntarily left the petitioner to form his own car stereo and accessories business in 2012. Counsel states that the beneficiary will replace the position of [redacted] and will receive wages equivalent to what [redacted] received in the past. Counsel also states that the petitioner had other employees, such as [redacted] and [redacted], both of whom worked as a mechanic – electronics/designer specialist for the petitioner. Counsel submitted IRS Forms W-2 of [redacted] and [redacted] and urges the AAO to consider their wages as evidence of the petitioner's ability to pay.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence in the record showing that [redacted] or [redacted] performed the proffered position. If the other employees mentioned by the petitioner performed other kinds of work, such as bookkeeping, for instance, then those workers would not qualify to temporarily work for the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In addition, we note that the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification.

Finally, counsel maintains on appeal that the petitioner has the ability to pay based on the *Sonegawa*'s totality of the circumstances standard. Specifically, counsel asserts that the petitioner has the growing gross receipts/sales through the years from the priority year of 2001. Counsel states that the petitioner has been doing business since 1997, over 15 years, has expanded from one shop to two, and has employed and paid six to nine employees in each of its shops.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The AAO acknowledges that the petitioner has been in a competitive business field since 1997 and is a thriving business. However, unlike *Sonegawa*, the petitioner in this case has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1997. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. As noted above, statements of counsel alone does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Further, the record is devoid of any evidence showing unusual

circumstances that would explain the petitioner's inability to pay the proffered wage during any of the relevant time period from the priority date in 2001 onwards, except 2006 and 2011 as noted above.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.